UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

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BRIAD WENCO, LLC

Employer,

and

FAST FOOD WORKERS COMMITTEE

Case No. 29-CA-165942

Union.

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CHARGING PARTY FAST FOOD WORKERS COMMITTEE'S CROSS-EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION AND ORDER

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INTRODUCTION

Pursuant to Section 102.46 of the Board's Rules and Regulations, Charging Party Fast Food Workers Committee ("Charging Party") hereby submits Cross-Exceptions to the Decision of the Administrative Law Judge ("ALJ") in the above-captioned matter dated July 6, 2016.

The ALJ correctly concluded that Briad Wenco, LLC ("Respondent" or "Employer") violated Section 8(a)(1) of the Act by maintaining arbitration agreements (collectively, "Agreement") that unlawfully burden, restrain and interfere with employees' Section 7 rights to engage in collective legal action regarding employment-related disputes and employees' rights to access the NLRB. (Decision 11:6 – 12:37). However, the ALJ's recommended Remedy and Order fails to adequately remedy Respondent's violation of the Act. Therefore, the Board should modify the recommended Remedy and Order for the reasons set forth below, and in accordance with the following exceptions.

EXCEPTIONS

No.	Page	Exception
1	13:5 – 13:14, 13:36 – 13:39	The ALJ failed to adequately remedy the Respondent's NLRA violation by recommending only that the Respondent notify current employees and applicants for employment that the Agreement has been rescinded, and failing to recommend that Respondent notify former employees who were employed at any time since the Agreement has been in effect.
2	13:5 – 13:14	The ALJ failed to adequately remedy the Respondent's NLRA violation by failing to recommend that the Respondent reimburse opposing parties in legal actions for reasonable legal fees and expenses incurred by such parties as a result of an attempt by Respondent to prohibit class,

		collective or other concerted claims/relief based upon the Agreement.

ARGUMENT

I. The ALJ failed to adequately remedy the Respondent's NLRA violations.

a. The order should require the Respondent to send notification to former employees who were employed at any time since the Agreement has been in effect.

The recommended Remedy and Order are deficient because they do not require Respondent to provide any notice to former employees or, more precisely, to individuals who are former employees at the time the Order is enforced. This class of former employees continues to grow prior to the Order's enforcement. Under the ALJ's recommended Remedy and Order, none of these individuals would receive any form of notice. The result is that many former employees who signed the unlawful Agreement, and who may still be eligible to initiate or participate in various forms of collective legal action against the Employer regarding their former employment, will never learn of the Agreement's rescission or revision or of their right to engage in such collective legal action—a right that the Agreement expressly tells such former employees they do not possess. If the ALJ's recommendations are left unmodified, Respondent's violation of the Act will not be adequately remedied.

The Board has "broad discretionary" power to "fashion[] remedies to undo the effects of violations of the Act." *N.L.R.B. v. Seven-Up Bottling Co. of Miami*, 344 U.S. 344, 346 (1953). *See also Sure-Tan, Inc. v. N.L.R.B.*, 467 U.S. 883, 898 (1984) ("The [Supreme] Court has repeatedly interpreted [NLRA Section 10(c)] as vesting in the Board the primary responsibility and broad discretion to devise remedies that effectuate the policies of the Act"). The Board may order all appropriate remedies, taking into account the particular circumstances, "in order to

dissipate as much as possible any lingering effects of… unfair labor practices." *Excel Case Ready*, 334 NLRB 4, 5 (2001).

The Board has ordered notice to former employees in unfair labor practice cases where necessary to effectuate the policies of the Act. *See*, *e.g.*, *House of Good Samaritan*, 320 NLRB 421 (1995) (requiring notice to former employees who selected severance option under strike settlement agreement, notifying former employees they were not ineligible for consideration for future employment by respondent); *Int'l Bridge & Iron Co.*, 357 NLRB No. 35 (Aug. 2, 2011) (requiring notice to former employees where respondent had ceased operations); *Banner Health Sys.*, 358 NLRB No. 93 (July 30, 2012) (requiring notice to former employees of any closed facility).

In cases following *D.R. Horton, Inc.*, 357 NLRB 2277 (2012), the Board has consistently applied this principle to require that employers notify former employees of the rescission of an unlawful arbitration agreement. *See*, *e.g.*, *Lincoln Eastern Management Corp.*, 364 NLRB No. 16, slip op. at 4 (2016) (ordering respondent to "[n]otify all current and former employees"); *On Assignment Staffing Services, Inc.*, 362 NLRB No. 189, slip op. at 10 (2015) (ordering respondent to "[n]otify all current and former employees who were issued the Dispute Resolution Agreement that the Dispute Resolution Agreement has been rescinded or revised"); *SolarCity Corporation*, 363 NLRB No. 83, slip op. at 6 (2015) (ordering respondent to "[n]otify all applicants and current and former employees who were required to sign or otherwise become bound to" the agreement); *Ross Stores, Inc.*, 363 NLRB No. 79, slip op. at 3 (2015) (ordering respondent to "[n]otify all current and former employees who were required to sign or otherwise become bound to" the agreement); *Murphy Oil USA, Inc.*, 361 NLRB No. 72, slip op. at 21

(2014) (ordering respondent to "[n]otify all applicants and current and former employees who were required to sign the Agreement").

Notably, the particular Section 7 right that the Employer has violated—the right to engage in collective legal action concerning terms or conditions of employment—is a Section 7 right uniquely appropriate for exercise by former employees vis-à-vis their former employers. The Agreement specifically leads employees to believe that they have waived that right to collective legal action permanently and irrevocably, through and after the termination of their employment. (Decision 5:4-5, 8:1-2, 10:47-48). Therefore, without appropriate notice to all former employees who have signed the Agreement, countless individuals—including those who are now employed but who may leave the Employer in the interim—will remain chilled from exercising their Section 7 rights to engage in collective legal action. Accordingly, the Board should modify the ALJ's recommended Remedy and Order to require that Respondent provide, to all current and former employees, employed at any time since the Agreement has been in effect, a copy of the NLRB notice and a specific notification that the Policy has been rescinded. The foregoing should be mailed to such former employees at their last known mailing address as well as emailed to them at their last known email address. Alternatively, and at a minimum, the Board should require that the Employer provide the foregoing notice with respect to all former employees employed at any time since June 10, 2015, the date six months prior to filing and service of the charge in this matter. (Decision 1).

b. The order should require that Respondent reimburse any opposing parties for reasonable attorneys' fees and litigation expenses incurred as a result of an attempt by Respondent to prohibit class, collective, or other concerted claims/relief based upon the Agreement.

The Board has held that in cases involving unlawful arbitration agreements, "[c]onsistent with the Board's usual practice in cases involving unlawful litigation," the Board "shall order the respondent to reimburse the plaintiffs for all reasonable expenses and legal fees, with interest" incurred in opposing efforts by the Employer to compel individual arbitration. *Murphy Oil USA LLC*, *supra*, slip op. at 21 citing *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 747 (1983) ("If a violation is found, the Board may order the employer to reimburse the employees whom he had wrongfully sued for their attorneys' fees and other expenses"). *See also Ross Stores, Inc.*, 363 NLRB No. 79, slip op. at 2 (2015) ("Consistent with our decision in *Murphy Oil*… we shall also order the Respondent to reimburse Charging Party Rachel Goss and any other plaintiffs for all reasonable expenses and legal fees, with interest, incurred in opposing the Respondent's unlawful motion in Superior Court to compel individual arbitration of the class claims"); *SolarCity Corporation*, 363 NLRB No. 83, slip op. at 7 (2015) (ordering respondent to "reimburse Anita Beth Irving and any other plaintiffs for any reasonable attorneys' fees and litigation expenses that they may have incurred in opposing the Respondent's motion to dismiss the collective lawsuit and compel individual arbitration"); *Century Fast Foods, Inc.*, 363 NLRB No. 97, slip op. at 2 (2016) (ordering respondent to "reimburse William Lujan and any other plaintiffs… for any reasonable attorneys' fees and litigation expenses that they may have incurred in opposing the Respondent's motion to stay the class lawsuit and compel individual arbitration"). Consistent with *Murphy Oil* and its progeny, reimbursement for reasonable legal fees and expenses incurred in opposing Respondent's attempts to enforce the unlawful Agreement is an appropriate remedy. The instant case was adjudicated on stipulated facts. (Decision 1). To the extent that the record does not disclose facts regarding specific legal actions, determinations regarding such facts are properly reserved for Compliance proceedings.

CONCLUSION

For all the reasons stated above, Board precedent supports the Board modifying the Remedy and Order to include the following additional remedies: (1) the Respondent notify current employees, applicants for employment, and former employees who were employed at any time since the Agreement has been in effect that the Agreement has been rescinded, (2) the Respondent reimburse opposing parties in legal actions for reasonable legal fees and expenses incurred by such parties as a result of an attempt by Respondent to prohibit class, collective or other concerted claims/relief based on the Agreement.

Dated: August 17, 2016
New York, New York

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that, in accordance with NLRB Rules & Regulations §102.114(i), on this 17th day of August, 2016, a copy of the foregoing Charging Party Fast Food Workers Committee's Cross-Exceptions to the Administrative Law Judge's Decision and Order in Case No. 29-CA-165942 was electronically filed and was sent to counsel for Respondent and counsel for the General Counsel by electronic mail, as set forth below:

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